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BUKIT BARU VILLAS SDN BHD v. MALAYSIA BUILDING SOCIETY BHD

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL J
[SUIT NO: 22NCC-203-07-2015]
23 DECEMBER 2015

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CIVIL PROCEDURE: *Injunction – Injunction to restrain presentation of winding-up petition – Principles for granting of Fortuna injunction – Whether presentation of petition would cause irreparable damage – Whether debt disputed – Whether injunction ought to be granted – Companies Act 1965, s. 218*

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The plaintiff made an application for financial facilities from the defendant to finance a housing project. The defendant, granted the plaintiff term and bridging loan facilities in the sum of RM2,000,000 and RM3,500,000 respectively. Accordingly, both parties executed a facility agreement. When the plaintiff breached the facility agreement, the defendant commenced a civil suit ('the original suit') against the plaintiff to recover the amount outstanding under the facility agreement. The defendant then issued a letter of offer and acknowledgement of indebtedness to the plaintiff ('letter of settlement'). The plaintiff accepted the terms of the letter of settlement and agreed to the amount due and owing ('indebtedness'). Under the terms of the letter of settlement, the plaintiff agreed, *inter alia*, for the purpose of an amicable settlement, to pay the defendant a sum of RM2,140,000 being the full and final settlement of its indebtedness ('settlement amount'). The settlement amount was to be paid in full by 10 March 2015 ('the deadline'). The plaintiff and defendant recorded a consent judgment in the original suit based on the agreed terms of the letter of settlement. However, when the defendant failed to pay the settlement amount by the deadline, the defendant, *inter alia*, issued a statutory notice pursuant to s. 218 of the Companies Act 1965 to the plaintiff. The plaintiff therefore filed the present suit together with an application *vide* encl. 4 to obtain an injunction against the defendant to restrain the defendant from filing a winding-up petition against the plaintiff ('*Fortuna* injunction application') The defendant, in opposing the *Fortuna* injunction application, relied on its right to file the winding-up petition as provided for by the consent judgment. The defendant also relied on the admission of indebtedness made by the plaintiff.

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Held (dismissing encl. 4 with cost):

(1) A *Fortuna* injunction may be granted by the court where the presentation of the petition would produce irreparable damage and where the proposed petition had no chance of success. A *Fortuna* injunction may also be granted in a case where the debt was disputed. A valid and enforceable judgment of court as in the present case, could not be

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considered a disputed debt. The plaintiff had admitted to the amount due and owing. This admission was more than sufficient justification for a winding-up order to be made against the plaintiff. (paras 23, 25 & 26)

(2) The defendant had served a *bona fide* statutory notice of undisputed debt as per the consent judgment and letter of settlement. In other words, the plaintiff's indebtedness was not disputed. In such circumstances, the intended petition was not bound to fail and had in fact a strong chance of success. The assertion that the plaintiff may suffer irreparable harm if the injunction was not granted was of no significance. The defendant was entitled to present any winding-up petition as it was within its legitimate right to do so. (para 27)

Case(s) referred to:

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australian [1978] VR 83 ***(foll)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(foll)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(foll)***

Legislation referred to:

Companies Act 1965, s. 218

For the plaintiff - V Dhanaraj (M Kalaiselvi with him); M/s Kamil Hashim Raj & Lim
For the defendant - Helmi Hamzah; M/s Hisham, Sobri & Kadir

Reported by Sandra Gabriel

JUDGMENT

Harmindar Singh Dhaliwal J:

[1] This was the plaintiff's application in encl. 4 to obtain a *Fortuna* injunction against the defendant ("*Fortuna* injunction application"). *Vide* the *Fortuna* injunction application, the plaintiff is seeking an order to restrain the defendant from filing a winding-up petition against the plaintiff.

[2] The defendant is opposing the *Fortuna* injunction application. Among others, the defendant relies on its right to file the winding-up petition as provided for by a consent judgment which was recorded by the parties in the Kuala Lumpur High Court No: 22NCC-169-05-2014 on 23 October 2014. The defendant also relies on the conduct and an admission of indebtedness made by the plaintiff before and after the consent judgment was recorded.

Background Facts

[3] The background facts and chronology of events leading to the filing of encl. 4 can be stated as follows. The plaintiff made an application to obtain financial facilities from the defendant to finance a housing project in Melaka, which was known as the "Proposed Residential Development comprising 37 Units Two-Storey Bungalow Houses in Bandar Bukit Baru, Melaka" ("housing project").

[4] The housing project would be erected on two pieces of land registered as Geran 11210 Lot 122, Bandar Bukit Baru Seksyen III, Daerah Melaka Tengah, Melaka ("Land No. 1") and Geran Mukim 143 Lot 556 Mukim Bukit Baru, Daerah Melaka Tengah, Negeri Melaka ("Land No. 2").

[5] On 6 August 2008, the defendant granted the plaintiff term loan and bridging loan facilities in the sum of RM2,000,000 and RM3,500,000 respectively *via* a letter of offer dated 6 August 2008 ("letter of offer"). The plaintiff accepted the terms of the letter of offer.

[6] On 27 February 2009, the plaintiff and defendant executed a financing facility agreement ("facility agreement"). As a security for repayment of the facility agreement, the plaintiff created a first party first legal charge on Land 1 and Land 2 under the National Land Code in favour of the defendant.

[7] When the plaintiff breached the facility agreement, the defendant on 16 May 2014 commenced a civil suit against the plaintiff to recover the entire amount outstanding under the facility agreement *via* Kuala Lumpur High Court Civil Suit No: 22NCC-169-05-2014 ("original suit").

[8] On 2 September 2014, the defendant issued a letter of offer and acknowledgement of indebtedness to the plaintiff ("letter of settlement"). The plaintiff accepted the terms of the letter of settlement. Under the letter of settlement, the plaintiff agreed to do among others the following items:

(a) the plaintiff agreed that the amount due and owing under the facility agreement as at 4 March 2014 was RM2,301,708.96 ("indebtedness");

(b) for the purpose of an amicable settlement and subject to the terms and conditions of the letter of settlement, the plaintiff must pay the sum of RM2,140,000 being the full and final settlement of the indebtedness ("settlement amount");

(c) as a consideration of the full and final settlement of the indebtedness, the defendant would waive penalty interest as at 30 June 2014 in the sum of RM299,000 ("penalty waiver");

(d) a consent judgment would be recorded in the original suit based on the agreed terms of the letter of settlement;

(e) the plaintiff must pay the settlement amount in the following manner:

(i) the plaintiff must pay an advance payment in the sum of RM50,000 to the defendant upon acceptance of the letter of settlement ("deadline for settlement amount payment No. 1");

(ii) the plaintiff must pay the balance of the settlement amount in the sum of RM2,090,000 by 10 March 2015 ("deadline for settlement amount payment No. 2");

(f) if the plaintiff failed to pay the balance settlement amount within the deadline for settlement amount payment No. 2 ie, on or before 10 March 2015:

(i) the settlement would be automatically terminated and the parties shall revert to the original amount outstanding under the facility agreement as at 10 March 2015 less all payments received as at 10 March 2015;

(ii) based on item (i) above, the original amount outstanding under the facility agreement shall include the penalty waiver in the sum of RM299,000. In other words, the plaintiff must also pay penalty charges for late payment in the sum of RM299,000; and

(iii) the defendant is entitled to execute the consent judgment and proceed with foreclosure proceedings on land No. 1 and land no. 2.

[9] On 17 October 2014, the plaintiff made an initial payment of RM50,000 of the settlement amount to the defendant *via* Public Bank cheque No. 494154. On 23 October 2014, the plaintiff and defendant recorded a consent judgment in the original suit based on the agreed terms of the letter of settlement ("consent judgment"). The consent judgment among other provides that:

(a) Defendan-Defendan hendaklah membayar kepada Plaintif jumlah terhutang sebanyak Ringgit Malaysia Dua Juta Satu Ratus Empat Puluh Ribu (RM2,140,000.00) sahaja ("Jumlah Penyelesaian Dipersetujui") menurut terma-terma Surat Tawaran bertarikh 2/9/2014 ("Surat Tawaran");

(b) Jumlah Penyelesaian Dipersetujui tersebut hendaklah dibayar oleh Defendan-Defendan kepada Plaintif seperti berikut:

(i) Ringgit Malaysia Lima Puluh Ribu (RM50,000.00) sahaja hendaklah dibayar oleh Defendan-Defendan kepada Plaintif sewaktu menandatangani penerimaan Surat Tawaran tersebut;

(ii) Baki bayaran Jumlah Penyelesaian Dipersetujui sebanyak Ringgit Malaysia Dua Juta dan Sembilan Puluh Ribu (RM2,090,000.00) sahaja (Baki Jumlah Penyelesaian Dipersetujui) hendaklah dibayar oleh Defendan-Defendan kepada Plaintif dalam tempoh enam (6) bulan dari tarikh 11/9/2014 ini iaitu pada/atau sebelum 10/3/2015 ("Tempoh Pembayaran").

[10] *Vide* a letter-dated 5 March 2015, the plaintiff applied for an extension of time to pay the balance of the settlement amount by 10 April 2015. The plaintiff also forwarded the following cheques to the defendant:

(a) Public Bank Berhad cheque No. 494182 dated 10 April 2015 in the sum of RM2,090,000; and

A (b) Public Bank Berhad cheque No: 750736 dated 11 March 2015 in the sum of RM25,080.

[11] *Vide* a letter dated 24 March 2015, the defendant's solicitors in the original suit informed the plaintiff that the defendant agreed to grant one month extension until 10 April 2015 to enable the plaintiff to pay the balance B of the settlement amount subject to part payment in the sum of RM300,000 being made by the plaintiff on or before 27 March 2015.

[12] On 26 March 2015, the plaintiff paid the sum of RM300,000 *via* Public Bank Berhad cheque No. 750739 to the defendant leaving the principal amount due and owing under the consent judgment in the sum of C RM1,790,000 to be paid by the plaintiff on or before 10 April 2015.

[13] However, *vide* a letter dated 9 April 2015, the plaintiff requested the defendant not to deposit the Public Bank Berhad cheque No. 494182 dated 10 April 2015 in the sum of RM2,090,000 which they forwarded to the D defendant on 5 March 2015. *Vide* that letter dated 9 April 2015, the plaintiff also requested for the outstanding sum under the consent judgment to be restructured for an unspecified period of time.

[14] *Vide* a letter dated 13 April 2015, the defendant requested the plaintiff to submit a comprehensive written proposal on the repayment of the amount E outstanding by 17 April 2015, failing which the defendant would proceed with the execution of the consent judgment and/or foreclosure proceedings on land 1 and land 2.

[15] *Vide* a letter dated 16 April 2015, the plaintiff made a request for financing of the housing project. *Vide* a letter dated 23 April 2015, the F defendant's solicitors in the original suit stated among others that:

(a) the plaintiff failed to provide a comprehensive written proposal to pay the entire amount outstanding. Instead, the plaintiff forwarded a request for further financing facilities of the housing project to the defendant;

G (b) the defendant rejected the plaintiff's request for further financing facilities; and

(c) the defendant demanded the plaintiff to comply with the terms of the consent judgment.

H **[16]** *Vide* a letter dated 29 April 2015, the defendant rejected the plaintiff's request to restructure the balance amount due and owing under the consent judgment by way of instalments. The defendant also demanded the plaintiff to pay the amount due and owing under the consent judgment by 30 April 2015.

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[17] On 2 June 2015, the plaintiff made a proposal to pay the balance of the settlement amount together with accruing interest from 10 March 2015 until full realisation within a period of two years. Alternatively, the plaintiff proposed to pay the minimum sum of RM100,000 every month and settle the outstanding amount within a period of one year.

[18] *Vide* an e-mail on 8 June 2015, the defendant informed the plaintiff that the defendant was not agreeable with the proposals made by the plaintiff *via* an e-mail on 2 June 2015. On 8 June 2015, the plaintiff admitted its indebtedness to the defendant and requested for a discussion to be held between the parties.

[19] However, *vide* a letter dated 10 June 2015, the defendant's solicitors in the original suit issued a statutory notice pursuant to s. 218 of the Companies Act 1965 to the plaintiff and demanded for a sum of RM2,081,702 to be paid by the plaintiff within a period of 21 days from the date of receipt of the said statutory notice.

[20] *Vide* two letters dated 10 June 2015, the defendant's solicitors in the original suit also issued a statutory notice pursuant to Form 16D of the National Land Code 1965 on the plaintiff and demanded for a sum of RM2,081,702.27, interest at 8.75% per annum and default interest at 1.0% per annum on the amount of RM2,081,702.27 from 11 June 2015 until full settlement.

[21] *Vide* a letter dated 16 June 2015, the defendant's solicitors in the original suit informed that the defendant was not agreeable to discuss further about the amount outstanding under the consent judgment. The plaintiff then filed the instant suit on 7 July 2015 together with the application in encl. 4.

The Relevant Law

[22] The law relating to *Fortuna* injunctions, or injunctions to restrain an intended winding-up petition, has its genesis in the case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australian* [1978] VR 83. In that case, eight related companies filed an application for an injunction to restrain the Deputy Commissioner of Taxation from presenting winding-up petitions against them. The companies contended that the claims were disputed as their references to the board of review were still pending. Macgrave J dismissed the companies' application for a *fortuna* injunction and held that:

> (1) The first branch of the principle under which the presentation of a petition may be restrained as an abuse of process applies only to a petition which has no chance of success … Even though a company has a genuine claim based on substantial grounds to have its assessment set aside by Board of Review, its non-compliance with the demand amounts, within s. 222(2) of the Companies Act, to a

neglect to comply with the demand. Accordingly, the plaintiffs had not established either ground on which they relied to show that the proposed petitions had no chance of success.

(2)(a) under a second branch of the principle the presentation of a petition may be restrained where the existence of a genuine cross claim by the company based on substantial grounds makes it likely that the petition, if presented, would either be dismissed or adjourned to await determination of the cross claim.

[23] In a case which is relevant to the present case, the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947 when dismissing an appeal by the appellant to obtain a *Fortuna* injunction had occasion to explain the two principles as follows (at p. 959):

> The first principle laid down in that case in that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie:
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> (i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and
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> (ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.
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> (see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240, [1963] 2 All ER 940; and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41, [1976] 1 All ER 25)
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> This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.
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> The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.
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> This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

[24] The above decision of the Court of Appeal was made in line with the decision of the Federal Court in *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437. In that case, a statutory notice was issued in excess of the exact amount due and owing. The Federal Court held that so long that the undisputed amount owing is more than RM500, the statutory notice pursuant to s. 218 of the Companies Act 1965 is not defective.

Decision

[25] Applying the principles as aforesaid, the statutory notice issued by the defendant is valid and not defective as it was based on the terms of the consent judgment. Even if the statutory notice was issued in excess of the actual amount due, the said statutory notice is still valid for the purpose of s. 218 of the Companies Act 1965.

[26] In the present case, the plaintiff has admitted that the amount due and owing is RM1,790,000. That admission is more than sufficient justification for a winding-up order to be made against the plaintiff. That being the case, the plaintiff's claim of purported defective statutory notice dated 10 June 2015 is untenable and devoid of merits.

[27] It is also plain that the defendant has served a *bona fide* statutory notice of undisputed debt as per the consent judgment and letter of settlement. In other words, the plaintiff's indebtedness is not disputed. In such circumstances, the intended petition is not bound to fail and has in fact a strong chance of success. Therefore the assertion that the plaintiff may suffer irreparable harm if the injunction is not granted is no significance. The defendant is entitled to present any winding-up petition as it is within its legitimate right to do so.

Conclusion

[28] In the circumstances, and for the reasons stated, the plaintiff has failed to satisfy both the principles for the granting of a *Fortuna* injunction. Accordingly, the application in encl. 4 is dismissed with costs fixed at RM8,000.